

**IN THE MATTER OF:
THE APPLICATION OF WRIGHT/GARFF
FOR A SMALL MINE PERMIT**

**MEMORANDUM OF LON THOMAS IN SUPPORT OF DECISION TO NOT
PROCESS THE APPLICATION OF WRIGHT/GARFF
TO CONDUCT SMALL MINING ACTIVITY**

This memorandum is submitted at the request of the Department Head of the Department of Natural Resources by Lon Thomas and Star Stone Quarries (Lon Thomas). It was requested that Lon Thomas and Wright/Garff submit memorandums addressing the question whether or not a permit could be issued to Wright/Garff, in essence, over the top of the permit of Lon Thomas. Lon Thomas supports the findings and the decision of the staff of the Department to refuse to process the application of Wright/Garff, therefore effectively denying the same.

1. THE HOSTILITY OF WRIGHT/GARFF.

The staff made a finding that there is hostility between Lon Thomas and Wright/Garff. This certainly is correct. As stated at the previous informal hearing by counsel for Lon Thomas an attempt was made to sit down with Ed Rogers and see if any solution could be negotiated. Ed Rogers at that time stated that he would negotiate nothing, that he would appeal at every level until he got his permit and that he would see that Lon Thomas was kicked off the site. There is pending litigation between the parties in which Ed Rogers has falsely accused Lon Thomas of stealing stone and Wright/Garff has refused to renew the previous lease for Lon Thomas to continue to quarry building stone on the property. Even after the lease was terminated with Wright/Garff Ed Rogers has made additional false allegations that Lon Thomas has stolen building stone.

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DIV. OF OIL, GAS & MINING

2. LON THOMAS HAS VESTED RIGHTS.

Vested rights in permits are universally protected. The California Supreme Court has stated the vested rights rule as follows: "It has long been the rule in this state and in other jurisdictions that if a property owner has performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government, he acquires a vested right to complete construction in accordance with the terms of the permit. (*Dobbins v. City of Los Angeles* (1904) 195 U.S. 223 [49 L.Ed. 169, 25 S.Ct. 18]; *Trans-Oceanic Oil Corp. v. Santa Barbara* (1948) 85 Cal. App. 2d 776, 784 [194 P.2d 148]. In Utah to obtain a vested right in a permit in an analogous zoning situation the court in *Western Land Equities v. City of Logan*, 617 P.2d 388 (Utah 1980), held that an applicant is entitled to a building permit or subdivision approval if his proposed development meets the zoning requirements in existence at the time of his application and if he proceeds with reasonable diligence, absent a compelling, countervailing public interest.

In water law cases an applicant for a permit must make a prima facie showing that the granting of the permit will not impair existing vested water rights. *Provo Water Users Association v. Lambert*, 642 P.2d 1219 (Utah 1982). If the vested right is a significant right it may not be extinguished or abridged by a body lacking judicial power. *Whaler's Village Club v. California Coastal Com.* 173 Cal.App.3d 240. The doctrine is applicable to land use and underwrites a vested right to a particular use of land in special circumstances when the landowner has acted in accordance with established law, or with the permission of the appropriate governmental agencies. *id.* A permit to use land cannot be revoked or altered arbitrarily. *Emmett McLoughlin Realty, Inc. v. Pima County*, 58 P.3d 39, 43

(Ariz.Ct.App.2002) .

By granting Lon Thomas a large mining permit he obtained a vested right to continue operations for the life and the mine and reclamation efforts thereafter that cannot be altered or revoked unless he violates the terms of the permit, thereby giving him vested rights. The suggestion of Mr. Rogers that the department revoke his permit to allow Wright/ Garff to quarry has no basis in the statutes or regulations governing this department and would offend the principle of vested rights. Only if Wright/Garff could make a prima facie showing that the granting of the Wright/Garff permit would not infringe on the vested rights of Lon Thomas to conduct his present operations and reclamation should a permit be issued to it.

3. WRIGHT/GARFF CAN QUARRY BUILDING STONE AFTER LON THOMAS HAS FINISHED RECLAMATION.

Wright/Garff could have included in the building stone lease they granted to Lon Thomas that at the end of the lease Lon Thomas would be required to transfer his mining and reclamation permits to Wright/Garff. If they had done so we would not have the present conflict. Failing to do so they now have no complaint that Lon Thomas can continue mining operations and finish his reclamation before they commence to quarry the remaining building stone. It should have been obvious to Wright/Garff when they leased the property to Lon Thomas that if they did not allow him to continue to quarry building stone that they would then have to wait to quarry until Lon Thomas had finished his operations and reclaimed the property.

4. THE ACTIVITIES OF LON THOMAS AND WRIGHT/GARFF ARE INCOMPATIBLE.

Lon Thomas has the right under his permit to mill stone that he is presently bringing in from other property. That is to process the stone by splitting and placing in pallets. He also has

the right to quarry rock from his BLM lease and crush it. Both of these activities are inherently incompatible with Wright/Garff's proposed mining activities. Even more compelling though is Lon Thomas's obligation and right to complete his reclamation. This includes among other activities the filling in of the very pit that Wright/Garff proposes to quarry from.

As the finding of the staff rightly states the reclamation and quarrying activities cannot be conducted at the same time. The position of the division that it will not permit two mines over the same area is totally reasonable and should apply if and until one proposing to permit the same area that is already permitted can present a prima facie case that the second permit will not interfere with the first. There may very well be situations where this could be shown, but certainly not in the matter now before the board.

5. THE POWER OF THE BOARD IS LIMITED.

Administrative bodies may exercise such powers only as are either expressly or by implication conferred upon it by statute; that is, it has no inherent power such as must frequently be exercised by courts of general jurisdiction *Crain v. W.S. Hatch Co.*, 451 P.2d 788, 22 Utah 2d 280. An administrative agency can only wield powers expressly or implicitly granted to it by statute. *TIG Ins. Co. v. Kauhane*, 101 Hawaii 311, 327, 67 P.3d 810, 826 (App. 2003).

However, it is well established that an administrative agency's authority includes those implied powers that are reasonably necessary to carry out the powers expressly granted, *Inc. v. Toledo-Lucas County Bd. of Health*, 773 N.E.2d 536, 545-46 (Ohio 2002) (noting that a statute's grant of power to an administrative agency "may be either express or implied, but the limitation put upon the implied power is that it is only such as may be reasonably necessary to make the express power effective"); *Public Util. Comm'n of Texas v. City Pub. Serv. Bd. of San Antonio*,

53 S.W.3d 310, 315 (Tex. 2001) ("The basic rule is that a state administrative agency has only those powers that the Legislature expressly confers upon it. But an agency may also have implied powers that are reasonably necessary to carry out the express responsibilities given to it by the Legislature."). The reason for implied powers is that, "[a]s a practical matter, the [L]egislature [cannot] foresee all the problems incidental to . . . carrying out . . . the duties and responsibilities of the [agency]." See *C.C.T. Equip. Co. v. Hertz Corp.*, 123 S.E.2d 802, 806 (N.C. 1962).

In this matter the board has properly viewed their function and not attempted to take action they are not empowered to take. It certainly is implied in the statutes and rules governing this body that they will not take action to impair vested rights and that it would be unreasonable to attempt to administer two permits for the same area. The board then must protect the permit of Lon Thomas with vested rights and deny the proposed permit of Wright/Garff that would create a situation that would be impossible to administer.

The present proposed action would be analogous to a situation where a board was charged with issuing permits for the use, lets say, of a concert hall. The hypothetical regulations only state that if an applicant meets certain criteria they will be granted a permit to use the hall. In January the board issued a permit for an orchestra to use the hall on July 4, 2007. In June another orchestra requested a permit to perform in the same hall on July 4, 2007, at the same time for which the permit was already issued. Even though the regulations did not address this situation the board would have implied power to deny the second application because it would interfere with a permit already issued and its decision to deny the second application would be appropriate and proper.

6. CONCLUSION.

The staff findings and decision not to process the application of Wright/Garff is proper and appropriate. It is impossible to accommodate the present operation and reclamation of Lon Thomas and the proposed quarrying of Wright/Garff. Wright/Garff must either reach an agreement with Lon Thomas or wait to quarry until Lon Thomas has finished his mining and reclamation. Wright/Garff created this dilemma, not Lon Thomas and not the board.

DATED: March 26, 2007.



Ronald George, attorney for Lon Thomas

NOTICE OF SERVICE

I certify that on March 26, 2007, I served a copy of the foregoing memorandum by facsimile and first class mail as follows:

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